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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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GROUP 1700

Application Number: 09/881,935.

Filing Date: June 15, 2001.

Appellant(s): SINGH ET AL.

Bell, Boyd and Lloyd LLC
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed March 21, 2007 appealing from the Office action mailed November 21, 2006.

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(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,669,975

ABENE et al.

12-2003

6,280,779

NADEAU et al.

8-2001

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6,042,857

JONES et al.

3-2000

5,340,211

PRATT

8-1994

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
1. Claims 1-7 and 11-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Abene in combination with Nadeau further in view of Jones et al.

Abene et al. teach the invention substantially as claimed. Abene et al. teach collecting information relating to certain attributes and physical conditions of a pet form pet profile, analyzing the information from the pet profile to form a dietary health management system. [See Column 3, last paragraph] Mixtures of selected functional ingredients can be added to a pre-made dry kibble specifically pointed out in Column 3,

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line 18 and Column 4, lines 55-57] Abene et al. teach providing specific feeding instructions for the pet based on the additives and kibble which was formulated based on the pet profile information. With respect to claim 12, wherein the pet profile is inputted through an electronic interface, Abene et al. teach that the appropriate formulation for customized dry kibble production and the addition of pet food products can be determined manually from the pet profile or alternatively a software program that will convert the information into an appropriate formulation for the customized dry kibble and will determine the proper wet food, for complete diet health management has been contemplated and there has been suggested in Abene et al. to use a WINDOWS based software system that accepts manual input about the general health conditions of an animal and can be run on a desktop computer. Abene further recites coating the volume of dry kibble pieces with a mixture of functional ingredients to coat the kibble and specifically teaches coating with safflower oil, fax seed oil, vitamin E oil.[Note Example 1 and Column 32, lines 45-54] The types of pet profiling information which is to be gathered in formulating the pet food has been taught in Table 2.

However, Abene et al. does not teach obtaining a biological sample analysis from the pet after the pet has eaten a combination of the kibble and the additive; suggesting a second pre-manufactured kibble and a second pre-manufactured additive that is based on the biological sample analysis and the individual pet profile.

Nadeau et al. specifically teaches providing a pet food composition which includes meat chunks and gravy wherein stool samples from the pet is analyzed after pet food has been eaten, and then the pet food is adjusted based on the stool sample

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results. Specifically, Pet Foods X, Y, and Z are prepared with ingredients as set forth in Tables I-III. Nadeau et al. teach that in a series of separate seven day feed tests, ten adult beagle dogs were fed only Pet Foods X, Y, and Z. The dogs were permitted 45 minutes to consume the food, the feces eliminated by each dog were evaluated daily and graded based on the condition of the fecal matter as set forth in Column 6, lines 44-60. The same experiment was conducted using 5 commercial meat foods and the stools were evaluated. Nadeau et al. teach that the dog food formulations particularly the thickening agents used in the gravies can be adjusted based on the stool quality and the food can be changed to provide improved dietary health of the pet.

Jones et al. teach providing a pet food, which is microbially stable and has an increased shelf life, freshness, palatability and nutritional value added pet food. The ingredients include high fibers such as oats, flax seed meal and psyllium to produce a diet high in soluble fiber.[Note Column 3, lines 55 to Column 4, line 29]. Jones et al. teach that the psyllium is added in order to bind the water, which renders the water unavailable for microbial growth and oxidation. Jones et al. also teach that providing a prolonged shelf life pet food and products include combinations of preservatives and/or antimicrobials and to include high levels of sugars, edible organic acids and inorganic acids to maintain pH and to manipulate the amount of acid to provide a pH in the range of 2 or 3 would have been obvious to one having ordinary skill in the art. [Note Column 4, lines 63-67] The amount of edible soluble fiber is above 3% as taught by Jones et al., which is higher than what is claimed by applicant but to reduce the amount or to modify the amount of psyllium added would have been obvious to one having ordinary

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skill in the art because the art recognizes that the amount of soluble fiber does bind water and modify the amount based on how much water binding is required for achieving dietary health benefits has been taught by Abene et al and Nadeau et al.

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a method for suggest a pet food for a pet from the combined teachings of Abene et al. who teaches specifically the concept obtaining a pet profile, processing the individual pet profile either manually or using a software package which correlates a premanufactured kibble which correlates with the processed pet profile and further can include additional ingredients such as additives which would be beneficial to the pet based on the individual pet profile. The concept of actually correlating the pet food after consumption with the pet's biological sample and analyzing the food and suggesting a different type of food based on the analysis has been generically taught by Nadeau et al. Jones et al. teaches applicant's specific type of fibers and additives and it is maintained that applicant's invention as a whole has been fairly taught and suggested by the prior art.

2. Claims 8-10 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Abene et al. in combination with Nadeau and Pratt.

Abene et al. in combination with Nadeau teach the invention substantially as claimed for reason delineated above.

However Abene et al. or Nadeau do not specifically teach using computer-controlled apparatus for administering pet food.

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Pratt teaches a method and apparatus whereby livestock and poultry are administered feed additives in their feed ration. The apparatus includes a programmable control, which dispenses and weighs feed additives into the feed ration for poultry and livestock. [Note Figure 1 and Claims 20-27]

It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide a method for suggest a pet food for a pet from the combined teachings of Abene et al. who teaches specifically the concept obtaining a pet profile, processing the individual pet profile either manually or using a software package which correlates a premanufactured kibble which correlates with the processed pet profile and further can include additional ingredients such as additives which would be beneficial to the pet based on the individual pet profile. The concept of actually correlating the pet food after consumption with the pet's biological sample and analyzing the food and suggesting a different type of food based on the analysis has been generically taught by Nadeau et al. Pratt teaches an apparatus which is capable of customizing a pet food product for a pet which includes means for obtaining an individual pet profile and means for processing the individual pet profile (note the computer in Figure 1) and means for creating a pet food additive, means for analyzing a biological sample (in Pratt weight is measured), there are means for adding additives to feed rations. It is maintained that applicant's invention as a whole has been fairly taught and suggested by the prior art.

(10) Response to Argument

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Appellants has argued that the examiner has not established a *prima facie* cases of obviousness that none of the references teach the steps of obtaining a biological sample analysis form the pet after the pet has eaten a combination of the kibble and additive and suggestion or preparing a second manufactured kibble and a second pre-manufactured or pet food additive based on the biological sample analysis and the individual pet profile as set forth in claims 1, 4, 11 and 13. The examiner respectfully disagrees with appellants for the reasons, which have been delineated above and reiterated. Applicant is arguing each reference singularly not what the combination of the references would teach. Abene et al. teach collecting information and inputting information regarding a pet such as attributes and physical conditions of the pet, the breed and forms a pet profile. Analyzing the information for the pet profile to create a dietary health management system as described in Column 3, the last paragraph. From the designed health management system mixtures of selected functional ingredients can be added to a pre-made dry kibble as described in Column 3, line 18 and Column 4, lines 55-57. The examiner agrees that Abene et al. does not teach taking a biological sample from the pet after eating the suggested pet food after inputting and receiving a health management formulation or pet food formulation. This deficiency has been taught by Nadeau et al. wherein a series of dog food formulations are given to a dog, the dog eats the dog food, a biological sample specifically a stool sample is taken from the dog, after consumption of the food, the stool sample is analyzed as to whether the stool is runny (diarrhea) or stool is hard (constipated) indicating the gastrointestinal well being of the dog, and the pet food which provides neither diarrhea or constipation is

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used for commercial use as a dietary pet for canines. It is the combined teachings of Abene and Nadeau, which would render applicant's invention obvious. It is the position taken by the Examiner that appellants has argued each reference individually and not what the combination of the references of Abene et al. and Nadeau would teach and or suggestion to one having ordinary skill in the art. Appellants are reminded that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

With respect to independent claim 12, appellants argue that the prior art does not teach receiving an analysis from a biological sample of the pet after the pet has been eating a pet food manufactured according the first pet food formula and creating or suggesting a pet food additive formula and a pre-manufactured kibble utilizing information obtained from the individual pet profile and biological sample analysis. The examiner is rejecting claim 12, based on the combined teachings of Abene et al. and Nadeau and further in view of Jones et al. Abene et al. teaches the concept of that the pet profile is inputted through an electronic interface. Abene et al. teach that the appropriate formulation of customized dry kibble production and the addition of pet food products can be determined manually from the pet profile or alternatively a software program that will convert the inputted information regarding the pet into a profile, the profile is then generated and manipulated through a windows based software system which will suggest additives, coatings which and a pet food formulation which can be

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added to pre-manufactured kibble which is customized to the pet's overall health. With respect to taking a biological sample analyzing the sample and then re-adjusting the food and/or suggesting a different food formulation, this would have been obvious to one having ordinary skill in the art, based on recognition from the teachings of Nadeau et al. who teaches taking a biological sample after a canine has eaten a food, and then adjusting the food/gravy to provide a pet food wherein gastrointestinal health is maintained and testing again. Nadeau et al. teach 5 pet food compositions with gravy and tests the dog after eating the samples [Note Column 6, lines 36-65] and teaches which food would be most desired which shows less gastrointestinal dysfunction and to use this type of biological sample analysis with the pet profiling and diet suggesting taught by Abene renders applicant's invention as a whole obvious to one having ordinary skill in the art. Although, not argued by appellants, Jones et al. teach providing a pet food which is microbially stable and specifically teach that the additives used in improving overall health in a pet, and can be added to pet food include edible soluble fiber and Jones is needed in order to provide the specific teachings of using specific soluble fibers such as psyllium in a pet food composition.

Appellants further argue that, even if the cited references are combinable, the references fail to suggest a number of elements of the present claims such as the step of obtaining a biological sample analysis from the pet after the pet has eaten a combination of a first kibble and additive that correlates with the processed pet profile as required in part by Claims 1, 4, 11 and 13. The examiner agrees that no single reference teaches applicant's claims. Appellants are respectfully reminded that the

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rejection has been made based on a combination of references. It is the position taken by the examiner that when reading Abene et al. in combination with Nadeau, that there would be recognition by the pet owner that when the customized food has been generated using the Abene et al. after inputting the pet's profile of attributes and overall health conditions, that after consumption of the designed customized food, if the pet were to develop any gastrointestinal or any other health related issues after consumption, the pet owner would have the pet taken to a Veterinarian who would then conduct tests and would examine a biological sample taken from the dog. In the alternative, the pet owner would probably discontinue using the customized pet food and try another pet food based on the advice from the Vet and/or from his or her own recognition that the pet food is not improving the overall health and physical well being of the pet, this would have been common sense for a pet owner. Nadeau specifically teaches that feeding a dog a number of pet formulations and taking a biological sample (stool sample) for analysis as to whether the pet food is suitable for commercial distribution and use as a suitable feed for dogs. It is maintained that from reading the references that applicant's invention has been taught and suggested by the combined teachings of Abene et al. and Nadeau.

Appellants argue that Jones fails to disclose or suggest the step of obtaining a biological sample analysis from the pet after pet has eaten a combination of a first kibble and additive based on an individual pet profile as required in part by claims 1, 4, 11 and 13. The examiner does not dispute appellant's analysis of Jones, the examiner concurs that Jones teaches a pet food, which includes appellants specific type of

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soluble fiber such as psyllium. The Examiner recognizes that Jones does not teach a pet profile and customizing a pet food taught. This is taught by Abene et al. Similarly, the Examiner recognizes that Nadeau doesn't teach a pet profile and/or using some of the additives of soluble fiber, which has been taught. Nadeau teaches the concept of taking a biological sample from a pet after the pet has consumed a pet food and re-formulating the food based on the results/analysis of the biological sample. The examiner admits no one reference teaches appellant's methods, but rather it what the combined teachings of Abene et al, Nadeau and Jones et al. would suggest to one having ordinary skill in the art on providing a method of making an individual customized pet food based on individual pet profiles and biological sample analysis and it is the position taken by the examiner that when reading Abene et al., Nadeau and Jones et al. applicant's method has been fairly taught and suggested by the combined teachings of the references.

Appellants argue that with respect to claims 8-10 that none of the references teach and/or suggest every element of independent claim 8, which requires means for obtaining a biological sample analysis form the pet after the pet has eaten a combination of the kibble and the additive in accordance with a process pet profile, means for suggesting a second pre-manufactured kibble and second pet food additive formula based on the biological sample analysis and the individual pet profile.

Appellants again arguing each reference singularly. The examiner has rejected claims 8-10 as being obvious over the combined teachings of Abene et al., Nadeau and Pratt. Abene teaches a method and apparatus which would suggest a customized pet food

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using a pet profile, the pet profile can be entered manually and/or uses a computer interface which includes a software package which correlates a pre-manufactured kibble composition to the pet profile and further includes adding additives/coatings to the pre-manufactured kibble to produce a customized pet food from the pet profile promoting overall health and wellness of the pet. Abene et al. does not teach using biological testing of the pet after the pet consumes the customized pet food. This is concept of providing different pet foods and selecting a particular type of pet food based on a biological sample taken from the pet after consumption has been taught in Nadeau. Pratt teaches a programmable apparatus and method for the delivery of microingredient feed additives by weight to pet food rations. The apparatus is capable of interfacing with the customized pet profile/diet system of Abene and is capable of customizing a pet food product and includes means for obtaining the pet profile information using a computer interface; the computer is capable of computational processing of the pet profile data, means for including additives which can be coated or add mixed to the kibble or feed. It is maintained that the apparatus for providing a customized pet food has been taught by Pratt, which can be interfaced with the pet profiling and customization of the pet food of Abene. The concept of using biological analysis in determining the efficacy of a pet food has been taught in Nadeau et al. and it maintained that the combined teachings of Abene et al., Nadeau et al. and Pratt renders applicant's invention as a whole obvious to one having ordinary skill in the art at the time the invention was made.

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(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

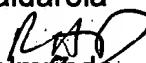
Respectfully submitted,



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